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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DWIGHT NIBLETT, Defendant and Appellant.	B285737 (Los Angeles County Super. Ct. No. TA142891)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Shultz, Judge. Dismissed.

Cliff Dean Schneider for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, Rama R. Maline, and Nicholas Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Dwight Niblett pleaded no contest to two counts of attempted murder and admitted the special allegations he personally and intentionally discharged a firearm, and he suffered a prior serious or violent felony within the meaning of the three strikes law and a serious felony pursuant to Penal Code section 667, subdivision (a).[1] Under the terms of the plea agreement, the trial court sentenced Niblett to 38 years in state prison. On appeal, Niblett contends the trial court failed to solicit evidence in mitigation from him during sentencing and failed to state its reasons for imposing the sentence under section 1170, subdivision (c). Because Niblett pleaded no contest and did not obtain a certificate of probable cause pursuant to section 1237.5, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Attempted Murders*

According to the probation report, on December 10, 2016 Niblett entered a store in Long Beach and asked employee Juan Navarro a question, then left the store. Francisco Marchan and his wife Yolanda Martinez were in the parking lot outside the store when a car drove by them and nearly hit them. The car stopped, and Niblett exited and approached them. An argument ensued, and Niblett removed a black handgun from his waistband and pointed it at Marchan and Martinez. Niblett hit Marchan over the head with the gun, causing injuries to Marchan's head and face. Niblett got back in the car and fled. As he was leaving, Niblett leaned out of the passenger window

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[1] All further statutory references are to the Penal Code.

and fired approximately six shots at Marchan and Martinez, although the bullets missed them. Navarro, who heard a woman screaming outside, exited the store to see what was happening. He heard five or six gunshots, and realized he had been shot.

B. *The Felony Complaint*

The People charged Niblett with three counts of shooting from a motor vehicle (§ 26100, subd. (c); counts 1-3); three counts of attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664; counts 4 [Marchan], 5 [Martinez]; 6 [Navarro]); and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 7). The complaint alleged as to counts 1 through 6 Niblett personally used a firearm during the commission of the offenses (§ 12022.53, subd. (b)), he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and he personally and intentionally discharged a firearm and proximately caused great bodily injury or death to Navarro (§ 12022.53, subd. (d)). As to counts 3 and 6, the complaint alleged Niblett personally inflicted great bodily injury on Navarro within the meaning of section 12022.7, subdivision (a).

Finally, the complaint alleged Niblett suffered a prior conviction for a serious or violent felony, which constituted a strike within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12), and a serious felony within the meaning of section 667, subdivision (a)(1).

C. *The Plea Agreement and Sentencing*

On August 17, 2017, pursuant to a negotiated agreement, Niblett pleaded no contest to two counts of attempted murder (counts 4 and 5). With respect to count 4, Niblett admitted the

allegation he personally and intentionally discharged a firearm pursuant to section 12022.53, subdivision (c). Niblett admitted he was previously convicted of a prior strike within the meaning of the three strikes law. As the trial court explained to Niblett, the People offered as part of the agreement that Niblett would be sentenced to an aggregate term of 38 years in state prison, comprised of the upper term on count 4 of nine years, doubled under the three strikes law, plus 20 years for the firearm-use enhancement. Under the agreement, Niblett would be sentenced to the upper term of nine years on count 5, doubled under the three strikes law, for a total of 18 years, to run concurrently with the term imposed on count 4.

Prior to accepting Niblett's plea, the court stated, "So Mr. Niblett, I just kind of want to make sure you understand what's happening. I want to answer any questions that you may have. And I want to advise you of your rights. [¶] [O]nce you enter the no-contest or guilty plea, as to Counts IV and V with the admissions that I discussed, you're going to be sentenced to 38 years in state prison. . . . [¶] . . . [¶] Is that your understanding of the deal, at least in terms of the time that you would receive, 38 years?" Niblett responded, "Yes."

The court also explained if Niblett were convicted of the two attempted murders, and the jury found true the allegation the attempted murders were willful, deliberate, and premeditated and he suffered a prior strike conviction, Niblett could be sentenced to multiple life sentences. The court asked Niblett, "Do you understand that?" Niblett responded, "Yes."

The trial court explained the nature and consequences of the plea and advised Niblett of his constitutional rights. Niblett stated he understood. Niblett's attorney joined in the waivers of

Niblett's constitutional rights, concurred in the plea, and stipulated to a factual basis pursuant to the police reports. The court found Niblett "underst[ood] the nature of the crimes charged in the complaint, the possible defenses, penalties and consequences"; his waivers of his constitutional rights were knowing, voluntary, and intelligent; and there was a factual basis for the plea.

At the same hearing the court sentenced Niblett according to the terms of the plea agreement: "As to Count IV, the Court selects the high term of nine years. That's doubled to 18 years pursuant to . . . [s]ection[s] 667 (b) through (j) and 1170.12, (a) through (e). That's an aggregate on count IV of 18 years plus an additional term of 20 years pursuant to the admission of [the section] 12022.53 (c) allegation. [¶] That's a total term or aggregate term of 38 years in state prison." The court sentenced Niblett to an 18-year term on count 5 to run concurrent with the sentence on count 4. The court dismissed the remaining counts and allegations pursuant to the plea agreement.

On October 5, 2017 the trial court held a hearing on Niblett's request for a certificate of probable cause. The next day the court denied Niblett's request. Niblett filed a timely notice of appeal in which he checked the preprinted box indicating, "This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea."

DISCUSSION

A. *A Defendant Must Obtain a Certificate of Probable Cause To Challenge the Validity of a Plea on Appeal*

"[S]ection 1237.5 provides that a defendant may not appeal 'from a judgment of conviction upon a plea of guilty or nolo contendere' unless the defendant has applied to the trial court for, and the trial court has executed and filed, 'a certificate of probable cause for such appeal.'" (*People v. Shelton* (2006) 37 Cal.4th 759, 766.)

The Supreme Court has "long recognized two exceptions to [the] requirement of a certificate of probable cause. First, a defendant may appeal from a ruling involving a search and seizure issue without obtaining a certificate . . . . Second, a defendant is 'not required to comply with the provisions of section 1237.5 where . . . he is not attempting to challenge the validity of his plea of guilty but is asserting only that errors occurred in the subsequent adversary hearings conducted by the trial court for the purpose of determining the degree of the crime and the penalty to be imposed.'" (*People v. Johnson* (2009) 47 Cal.4th 668, 677, citations omitted (*Johnson*); accord, *People v. Cuevas* (2008) 44 Cal.4th 374, 379 ["Exempt from this certificate requirement are postplea claims, including sentencing issues, that do not challenge the validity of the plea."]; *People v. Buttram* (2003) 30 Cal.4th 773, 781 (*Buttram*) ["'It has long been established that issues going to the validity of a plea require compliance with section 1237.5.'"].)

When a defendant challenges the sentence imposed after a guilty plea, we determine "whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus

rendering the appeal subject to the requirements of section 1237.5." (*People v. Panizzon* (1996) 13 Cal.4th 68, 76 (*Panizzon*); accord, *Buttram, supra*, 30 Cal.4th at p. 781 [same].) A challenge "to the imposition of a negotiated sentence" goes to "the heart of [the] plea," and therefore constitutes a challenge to the plea itself, triggering the requirements of section 1237.5. (*Panizzon*, at p. 76.)

Case law interpreting the certificate of probable cause requirement "draws a line between pleas in which the parties agree that the court will impose a specific, agreed-upon sentence, and pleas in which the parties agree that the court may impose any sentence at or below an agreed-upon maximum. A certificate of probable cause is required for the former [citations], but not the latter (except where the defendant challenges the legal validity of the maximum sentence itself) [citations]. This differential treatment flows directly from the substance of the parties' agreement: Where the parties agree to a specific sentence, the court's '[a]cceptance of the agreement binds the court and the parties to the agreement' [citation], and a defendant's challenge to the specific sentence is '*in substance* a challenge to the validity of the plea' [citation]. But where the parties agree to any sentence at or beneath an agreed-upon maximum, that 'agreement, by its nature, contemplates that the court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority' do not attack the validity of the plea and 'will be reviewable on appeal' without a certificate of probable cause." (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 55-56.)

The Supreme Court's holding in *Panizzon* is directly on point. There, the defendant agreed to plead no contest to the

charges in exchange for a specific prison sentence. (*Panizzon, supra*, 13 Cal.4th at p. 74.) Although the trial court sentenced the defendant to the agreed-upon prison sentence, the defendant appealed his sentence, contending it violated the Eighth Amendment's prohibition on cruel and unusual punishment. (*Panizzon*, at pp. 74-75.) The Supreme Court held that because the defendant had agreed to the sentence, his challenge was, in substance, a challenge to the validity of the plea, and therefore required a certificate of probable cause. (*Id.* at p. 79.) Because the defendant had not obtained a certificate of probable cause, the Supreme Court dismissed the appeal. (*Ibid.*)

By contrast, in *Buttram*, the defendant agreed to a maximum sentence, but not to a specific sentence within the maximum. (*Buttram, supra*, 30 Cal.4th at p. 787.) The Supreme Court concluded that "absent contrary provisions in the plea agreement itself," a certificate of probable cause was not required for a defendant to challenge the trial court's exercise of its sentencing discretion where the negotiated plea was to an agreed-upon maximum sentence. (*Id.* at pp. 790-791.) Unlike the defendant in *Panizzon*, the defendant in *Buttram* had not agreed to a specific sentence, and thus his challenge to the sentence did not attack the validity of his plea. (*Buttram*, at pp. 786-787.)

To determine whether a defendant must obtain a certificate of probable cause under section 1237.5, we perform "an individual analysis whether the appellate claim at issue constitutes, in substance, an attack on the validity of the plea." (*Buttram, supra*, 30 Cal.4th at p. 790; accord, *Panizzon, supra*, 13 Cal.4th at p. 76; see *Johnson, supra*, 47 Cal.4th at p. 678 ["Even when a defendant purports to challenge only the sentence imposed, a certificate of probable cause is required if the challenge goes to an

aspect of the sentence to which the defendant agreed as an integral part of a plea agreement."].)

B. *Niblett's Challenge to His Sentence Is an Attack on the Validity of the Plea*

Niblett contends the trial court failed to provide him an opportunity to present mitigating evidence under section 1204 and failed to state its reasons for imposing the sentence as required by section 1170, subdivision (c). On this basis he requests we remand the case for resentencing. Niblett's contentions fall squarely within the holding in *Panizzon* because Niblett bargained for the specific sentence he received—an aggregate term of 38 years in state prison. Niblett clearly indicated he understood the terms and consequences of the plea. Unlike in *Buttram*, the trial court did not later exercise its discretion in selecting Niblett's sentence. Accordingly, Niblett's "challenge to the sentence is *in substance* a challenge to the validity of the plea," requiring a certificate of probable cause under section 1237.5. (*Panizzon, supra*, 13 Cal.4th at p. 76.) Because Niblett did not obtain a certificate of probable cause, we dismiss his appeal.[2]

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[2] We also note neither of Niblett's arguments has merit. First, a defendant's right to present testimony in mitigation is forfeited if the defendant does not offer the testimony before the pronouncement of sentence. (*People v. Evans* (2008) 44 Cal.4th 590, 600; *People v. Nitschmann* (2010) 182 Cal.App.4th 705, 708.) Second, a sentencing court is not required to provide reasons for sentencing choices made when the defendant, as part of a negotiated plea, pleads to an offense and agrees to a specific sentence. (*People v. Villanueva* (1991) 230 Cal.App.3d 1157, 1162; see Cal. Rules of Court, rule 4.412(a) ["It is an adequate

DISPOSITION

The appeal is dismissed.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.

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reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it."].)